IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NOS.3 AND 4 OF 2002

CRIMINAL APPEAL NO. 3 OF 2002

Mr. Sanvlo Naik,
Police Constable,
Ponda Police Station,
Ponda. ... Appellant.

versus

State ... Respondent.

Mr. S. D. Lotlikar, Senior Advocate with Mr. A. D. Bhobe, Advocate for the Appellant.

Mr. V. P. Thali, Senior Central Government Standing Counsel for the State/Respondent.

CRIMINAL APPEAL NO. 4 OF 2002

Mr. S. V. Caeiro,
Retd. Police Inspector,
Margao Town Police Station,
Goa and permanent resident
of H.No.392/A, Botica,
Navelim, Salcete, Goa. ... Appellant.

versus

State ... Respondent.

Mr. S. G. Dessai, Senior Advocate with Mr. Arun Bras de Sa, Advocate for the Appellant.

Mr. V. P. Thali, Senior Central Government Standing Counsel for the State/Respondnt.

CORAM: P. V. HARDAS, J.

DATED: 1ST AUGUST, 2003.

ORAL JUDGMENT

The Appellants who are Original Accused Nos.5 and 2 have filed the Appeals challenging their conviction for an offence punishable under Section 304(II) r/w 34 of the Indian Penal Code and sentence of 3 years Simple Imprisonment and fine of Rs.25,000/-, in default Simple Imprisonment for 1 year for Accused No.2 and Simple Imprisonment for 2 years and fine of Rs.5000/-, in default Simple Imprisonment for 3 months for Accused No.5, by the Sessions Judge, South Goa, Margao, by Judgment dated 21st January, 2002, in Sessions Case No. 19 of 1996.

2. The facts in brief as are necessary for the decision of the Appeals are set out hereunder:-

The Appellant Sanvlo Naik, Original Accused No.5 in Criminal Case No.3 of 2002 was working as Police Constable attached to the Margao Town Police Station. The Appellant S. V. Caeiro, Original

Accused No.2 in Criminal Appeal No.4 of 2002 was the Inspector in-charge of the Margao Town Police Station. Deceased Abdul Gaffar Khan was arrested on the midnight of 16/17th May, 1994 by Accused No.2, S. V. Caeiro and with Accused No.5, Sanvlo Naik as the deceased Abdul Gaffar Khan was an Accused in Crime No.141/94 under Sections 447, 506(II) of the Indian Penal Code, registered by the Margao Town Police Station, on a complaint filed by P.W.1, Kulsum Bi Khatib. He was taken to the Margao Town Police Station. The deceased Abdul Gaffar Khan was declared dead on being taken to the Hospicio Hospital. He was examined by P.W.5, Dr. Anand Sawant and P.W.13, Dr. Jayant Dessai, who pronounced him dead at 2.45 a.m. on 17th May, 1994. At about 3.30 a.m., the Superintendent of Police was informed about the death by Original Accused No.1, Joe D'Souza and at 4.00 a.m. the Superintendent of Police, P.W.15, Dattaram P. Dessai, informed the District Magistrate, P.W.12, Dharmendra. P.W.12, District Magistrate, Dharmendra, instructed the Sub Divisional Magistrate, P. K. Goel, who seized the lock-up register, arrest register and other documents of the Margao Town Police Station. A formal intimation in writing regarding the custodial death of deceased Abdul Gaffar Khan was received by P.W.12, District Magistrate, Dharmendra at Exh.78 at about 5.30 a.m. from Accused No.1, Joe D'Souza.

P.W.12, District Magistrate, Dharmendra, then took up an enquiry under Section 206 of the Code of Criminal Procedure and conducted an inquest on the dead body of deceased Abdul Gaffar Khan, instructed photographs to be taken of the dead body, appointed a Committee of medical experts to conduct the autopsy and examined 29 witnesses. His report is at Exh.76. It was forwarded to the Chief Secretary, Government of Goa on or about 23rd May, 1994.

3. One Liyakat Ali Khan, P.W.21, brother of deceased Abdul Gaffar Khan, filed a private complaint at Exh.103 in the Court of the Judicial Magistrate First Class, Margao. The said private complaint was registered as Criminal Case No.213/P/94/C. After recording the verification statement of the Complainant, the learned Judicial Magistrate First Class, Margao, issued process against all the Accused except Original Accused No.3, Gundu Naik and Original Accused No.4, Narayan Yetale. It appears that against the issuance of process, the Accused filed Criminal Revision Application No.21 of 1994 and the same was allowed by Order dated 17th August, 1994. By the said Order, it appears that the learned Magistrate was directed to record his findings regarding the fulfilment of the requirement of obtaining previous sanction. The learned Magistrate by his Order dated

27th February, 1996, dismissed the complaint against all the Accused for want of a valid sanction. The Order of the learned Magistrate dismissing the complaint was challenged by the Complainant before the Additional Sessions Judge who by his Order dated 24th February, 1997, set aside the Order of the learned Magistrate. The learned Magistrate was directed to commit the case to the Court of Sessions. The said Order was challenged before this Court at the behest of Original Accused No.1, Joe D'Souza, Accused No.6, Jerry Gomes and Accused No.8, Pequeno. The revision was partly allowed by this Court and it quashed the Order dated 24th February, 1997 of the learned Additional Sessions Judge to the extent that no previous sanction was necessary. On committal of the case to the Court of Sessions, it was registered as Sessions Case No.25 of 1997.

4. In the meantime, P.W.22, G. P. Chimulkar, Joint Secretary(Home) wrote a letter at Exh.111 to the Inspector General of Police with a request to register the offence under Section 302 of the Indian Penal Code and to commence investigation through the Crime Branch and also requested to move the C.B.I. for taking over the investigation of the case. Accordingly, Dy.S.P., C.I.D. Crime Branch, Panaji, registered Crime No.2 of 1994 on 1st July, 1994 and executed the scene of

offence panchanama at Exh.105. The station diary, lock-up register etc. came to be attached. After issuance of the Notification at Exh.114, P.W.25, James Kurien, Dy.S.P. of C.B.I. commenced investigation from 27th September, 1994. After completion of the investigation, a charge-sheet against the present Appellant S. V. Caeiro, Original Accused No.3, Gundu Naik, Original Accused No.4, Narayan Yetale and Appellant/Accused No.5, Sanvlo Naik came to be filed. It was committed to the Court of Sessions after the Government had accorded sanction to prosecute Accused No.2 and the case was registered as Sessions Case No.19 of 1996.

5. Vide Exh.31, charges against 7 Accused was framed by the learned Sessions Judge, South Goa, Margao, for an offence punishable under Section 302 r/w 34 of the Indian Penal Code. The prosecution in support of its case examined 25 witnesses. The learned Trial Judge by his aforesaid Judgment convicted and sentenced the Appellants as aforestated who in the present Appeals have challenged their conviction and sentence.

6. The learned Trial Court in respect of the eye witnesses namely P.W.6, Ravi Kerkar, P.W.8, Altaf Baig, P.W.9, Rama Surmeia and P.W.21, Liyakat Ali Khan

has doubted their claim for being eye witnesses to the incident. The learned Trial Court in para 33 of its Judgment held that Original Accused No.4, Narayan Yetale and Accused No.3, P.S.I. Gundu Naik, were entitled to be acquitted as there was no direct or circumstantial evidence on record to justify their involvement in the assault of the deceased. In para 34 of the Judgment, the learned Trial Court while considering the case of the Appellants S. V. Caeiro and Sanvlo Naik considered their case differently by adopting "a realistic approach in the light of the principles laid down by the Hon'ble Supreme Court in the case of **State of M.P.** v. **Shamsunder Trivedi and others** reported in (1995) 4 SCC 262 i.e. by considering ground realities and circumstances".

7. I have heard Mr. S. G. Dessai, learned Senior Counsel and Mr. S. D. Lotlikar, learned Senior Counsel appearing on behalf of the Appellants. The learned Senior Counsel appearing on behalf of the Appellants have urged that there is no evidence whatsoever that deceased Abdul Gaffar Khan was assaulted by the Appellants in the cabin of the Police Inspector. They have also urged that there is no evidence whatsoever that the deceased was assaulted in the female lock-up in which he was placed. According to the learned Senior Counsel, the conviction is based

on conjectures and surmises and the conviction is wholly unsustainable in the absence of any evidence regarding the involvement of the Appellants. They have also urged that the defence of the Appellants particularly the fact that after placing the deceased in the lock-up, the Appellants had left the Police Station is clearly borne out from the substantive evidence of the witnesses and the documents on record.

8. Mr. V. P. Thali, learned Counsel appearing on behalf of the State/Respondent in both the Appeals has submitted that the learned Trial Court has recorded the conviction and sentence of the Appellants after appreciation of the evidence. According to him, there is no perversity in the reasoning. The learned Trial Court has rejected the plea of the Appellants that they had left the Police Station and, therefore, the Appellants have been rightly convicted.

9. I will first advert to the medical evidence which consists of P.W.13, Dr. Jayant Dessai. P.W.13, Dr. Jayant Dessai, states that at the relevant time, he was attached to the Hospicio Hospital as a Medical Officer. From 9 a.m. of 16th May, 1994 to 9 a.m. of 17th May, 1994, he was on emergency duty at the hospital. P.W.5, Dr.Anand Sawant was also working on

emergency duty on that day. At 2.40 a.m., a patient by name Abdul Gaffar Khan was brought to the Casualty by Police Constable Buckle No.687. He examined the said patient and found that there were no respiratory movements, no cardiac sound, pupils were fixed and moderately dilated. The patient was, therefore, declared dead. He has identified his signature on the register maintained by the hospital at Exh.80. He further states that on 17th May, 1995, he examined Police Constable Buckle No.2899, Sanvlo Naik. According to him, the said Sanvlo Naik, had minor superficial bruises caused by hard object and was simple in nature. He had also an abrasion on the right index finger caused by hard object and simple in nature. According to him, there were no injuries which were caused by tooth bite. Exh.81, is the Memo for examination and Exh.82 is the Hurt Certificate. In the cross-examination, it was admitted that he was in the Casualty Department when the patient was brought. P.W.5, Dr. Anand Sawant, had first examined the patient in the Casualty Department and then he had examined. He has stated that he does not remember whether he had stated to the Magistrate that the servant had come and informed him that a patient was brought at 2.40 a.m. He has denied the suggestion that the timings as to when the patient was brought have been tampered with. He has also stated that he

does not remember exactly for how long he attended the patient but might have taken 15 to 20 minutes to examine him. In the further cross-examination, on behalf of the other Accused, he admitted that his statements were based on the record of the hospital. He has admitted that a number of patients are brought to the hospital, both during day time and night time and it would not be possible for a doctor to remember the injuries and observations on a patient unless records are seen. He has admitted that he has described the injuries on Sanvlo Naik on the basis of the Hurt Certificate issued by him. He has admitted that it is possible that injury no.2 on Sanvlo Naik was caused by tooth bite.

10. P.W.5, Dr. Anand Sawant, states that in 1994, he was working as a Medical Officer in Hospicio Hospital, Margao. P.W.13, Dr. Jayant Dessai, was also working in the hospital. He was on duty from 9 a.m. of 16th May, 1994 to 9 a.m. of 17th May, 1994. He was on duty in the Gynaecology Department as at that time, the Hospicio Hospital did not have a Casualty Department. On 17th May, 1994, at 2.40 a.m., one person was brought to the Casualty Department by the Margao Police. He was brought by Constable Buckle No.687. The name of the person who was brought to the Casualty Department was Abdul Gaffar Khan. According

to P.W.5, Dr. Anand Sawant, he examined the said person and found him dead. He accordingly declared the said person as dead. Xerox copy of the Memo is at Exh.49 and Exh.50 is the true copy of the Casualty register. He has admitted that there were injuries on the said Abdul Gaffar Khan but he could not describe the said injuries because he did not prepare any Hurt Certificate. He was shown the photographs and he identified the said person in the photograph to be the person who was brought in the Casualty Department.

11. In the cross-examination, he has admitted that the timing 2.40 in the register at Exh.50 has been written twice. Earlier, the timing 2.40 was written by a nurse and thereafter, it was overwritten again. He has admitted that usually, the Memo which they have received is pinned to the register. He has also stated that he must have pinned the Memo but does not remember about the same. He has stated that he does not know whether on that particular night some Police personnel were also examined in the hospital. He has admitted that the timing 2.40 written below the first timing 2.40 on Exh.50 was written by him because it was a Medico Legally Significant Case. He does not remember whether who had given the history of the patient which is mentioned in Exh.50.

12. The post mortem on the dead body of Abdul Gaffar Khan was conducted by P.W.10, Dr. Silvano Dias Sapeco. P.W.10, Dr. Sapeco, states that on 17th May, 1994, the District Magistrate, Margao, requested the Medical Superintendent of Hospicio Hospital to appoint a Board of three senior doctors to perform the post mortem examination of deceased Abdul Gaffar Khan. The said letter is at Exh.65/A. Vide Exh.66, the Medical Superintendent constituted a Board consisting of P.W.10, Dr. Silvano Dias Sapeco, Dr. Sanjeev Dalvi and Dr. Ricardo L. Tellis. The post mortem was conducted by the three doctors under the "Chairmanship" of P.W.10, Dr. Silvano Dias Sapeco. The deceased had following ante-mortem injuries:-

1. In an area of 40 x 40 cms. on nape of neck to back of chest, there were 39 railrod patterned contusional marks with abrasional areas on some of them along various sites and positions, the maximum being 22 x 1 cms. and minimum being 6 x 1 cms.

2. The right buttock has 8 railrod patterned contusional marks along various positions. The maximum being 11 x 1 cms. and minimum being 6 x 1 cms.

3. The right dormen along back and outer aspect in an area of 84 x 13 cms. has blue contusional marks(consequent to multiple impact by broad

object or force or surface impact) with abrasional area of 7 x 4 cms. at ankle region.

4. Along back of left buttock to lower leg in an area of 90 x 19 cms, there are 17 railrod patterned contusional marks at various positions, the maximum being 15 x 1 cm and minimum being 6 x 1 cm and blue contusional marks along lower third of thigh onwards upto scalp and foot.

5. Along back of right upper limb in an area of 45 x 9 cms there are 3 railrod patterned contusional marks, the maximum being 9 x 1 cm and the minimum being 6 x 1 cm at the dorsum of right forearm, there are blue contusional marks.

6. Along scalp vault there are 4 haemotomas and at right temple there is one haemotoma, each of 4 x 3 cms. in size and at various positions on frontal region of forehead and at left temple there are abrasions each being 1 x 1 cms.

7. The outer aspect of left upper limb is in an area of 69 x 10 cms. and has 15 railrod patterned contusional marks along various positions, the maximum being 15 x 1 cms and the minimum being 6 x 1 cms and blue contusional marks along dorsum of left hand, wrist and forearm.

8. The front and outer aspect of right upper limb in an area of 69 x 10 cms. has railrod patterned

contusional marks along various positions, the maximum being 15 x 1 cm and the minimum being 6 x 1 cm and blue contusional marks along the dorsum of right hand, wrist and forearm.

9. In an area of 63 x 20 cms from the right loin to the right knee there are 19 railrod patterned contusional marks along various positions, the maximum being 17 x 1 cms and the minimum being 6 x 1 cm and blue contusional marks along outer aspect of left thigh.

10. In an area of 50 x .13 cms. along right lower leg from knee cap to the ankle foot there are 13 abrasions, the maximum being 2 x 1 cms and the minimum being 1 x 1 and half cms. and blue contusional marks are seen along outer aspect of right thumb and skin region.

11. In an area of 40 x 14 cms along front of right thigh and leg there are 14 railrod patterned contusional marks at various positions, the maximum being 19 x 1 cms and the minimum being 6 x 1 cms and blue contusional marks are seen along outer aspect of the whole thigh.

12. In an area of 24 x 10 cms along front of left, lower leg there are 4 contused lacerated wounds each of 1 x 1 x 1 cms. along the chin aspect acqui distant irregularly.

13. At the dorsum of left foot in an area of 13 x 7 cms. there are blue contusional marks.

14.	Irregular linear abrasions directed from above downwards having a peri-metric length of 28 cms. x linear is seen from left side of breast to abdominal front.

13. The internal examination of the patterned contusional and blue contusion showed pooling of blood effect within the underlying tissues ranging from 3 to 10 cms. The cause of death was due to haemorrhage and shock as a result of multiple injuries which were caused within 6 hours prior to death. He also opined that the injuries were fatal within the ordinary course of nature. According to him, the injuries were caused by hard and blunt object and were ante mortem in nature. The report of the post mortem is at Exh.67. He has admitted to have received the letter at Exh.68 from the Appellant S. V. Caeiro, P.I. regarding the examination of the deceased by P.W.5, Dr. Anand Sawant at 2.40 a.m. on 17th May, 1994. Exh.69 is a copy of the letter for examination of the viscera. In the cross-examination, it is admitted that injury no.6 hypothetically could be caused by banging the head on the wall by four different impacts. He has also admitted that an injury changes its appearance from the time it is inflicted and with the passage of time until its complete healing. Because the injuries were fresh in nature that is why he had opined that it had been caused within 6 hours

from death. He has also admitted that individually none of the injuries were fatal in the ordinary course of nature but were fatal cumulatively. He was asked the following question:-

> Q. On what basis do you say that the said injuries are cumulatively fatal in nature? Do you have anything to support your opinion?
>
> A. When I made an internal examination, underneath the patterned contusions and the blue contusions, there was pooling of blood effect seen within the underlying tissues ranging to a depth of 3 to 10 cms.

14. He has also admitted that the shock factor comes into play when blood is collected beneath the tissues and the return of the blood to the heart becomes nil or less. In the further cross-examination, he has admitted that "Injury No.6, the 4 haematomas could not have pooled that much blood as to give rise to shock and death". He has admitted that he has not mentioned in his report about the constriction regarding the blood vessels which normally occur in case blood does not return to the heart. He has also admitted that the nature of the injuries found on the deceased could be caused in a gang fight. The maximum injuries were on the back.

In further cross-examination, he has admitted that except injury no.12 which was a bleeding injury there were no external bleeding injuries. In the further cross-examination, he has admitted that all the injuries were collectively fatal and not individually.

15. I shall now advert to the evidence of the Police Officers who were attached to the Margao Town Police Station. P.W.2, A.S.I. Yeshwant Dessai, states that he was attached as Assistant Sub Inspector in the Margao Town Police Station from 1990 to 1995. Exh.40 is the F.I.R. which was registered on the basis of the complaint of P.W.1, Kulsum Bi Khatib. On the basis of the complaint of P.W.1, Kulsum Bi Khatib, an offence under Sections 447 and 506 of the Indian Penal Code was registered against Abdul Gaffar Khan. The case was handed over to Head Constable Buckle No.1257 for further investigation. He has further stated that the Accused No.2, Caeiro was the Officer in-charge of the Margao Police Station and Accused No.1 was the Dy.S.P. In the cross-examination, he has admitted that Margao Police Station is located near the Old Bus Stand at Margao. It is a huge building having length of about 25 to 30 metres. There were two Police Stations, one being Margao Town and the other being Maina-Curtorim. The building has ground

floor plus two floors. The C.I.D. Department is also located in that building as also the Offices of the Superintendent of Police, South Goa and of the Dy.S.P. The Office of the Fire Brigade is also located in that building. There is a Police canteen located in that building. There are Police barracks on the first floor which are occupied by 25 to 35 Police Officers. In respect of the evidence of P.W.6, Ravi Kerkar, P.W.8, Altaf Baig, P.W.9, Rama Surmeia and P.W.21, Liyakat Ali Khan, the learned Trial Court in paragraph 22 of its Judgment has observed that "in the light of contradictions, improvements and improbabilities in their evidence, that they were not present at all and had not seen the assault. Probably, they like everybody else knew that the deceased Abdul Gaffar Khan was assaulted in the lock-up and had died due to that assault, but have concocted facts and have deposed as if they had witnessed the assault". The learned Trial Judge in the same paragraph has further observed " the evidence of the aforesaid witnesses, therefore, has also got to be rejected being inherently improbable. No Accused can be convicted on the basis of such evidence".

16. The prosecution has examined P.W.11, Keshav Komarpant and the other Police Officers who were at the Police Station namely P.W.16, Ulhas Saluke,

P.W.17, Constable Abdul H.K.Khan, P.W.18, Constable Anil Kerkar, P.W.19, Constable N.Kalangutkar and P.W.20, Head Constable Balkrishna Moge.

17. P.W.11, Keshav Komarpant, states that he was attached to the Margao Town Police Station from 1989 to 1997 and during that time was working as a Constable. Appellant Caeiro was incharge of the Police Station from 1993 to May, 1994. He was on duty on 16th May, 1994 on night patrol duty. The signal bell was given at 10.50 p.m. On hearing the said bell, the Constables are required to report the S.H.O. on duty in uniform. According to him, P.W.20, Havaldar Balkrishna Moge, was a S.H.O. on that day. As per the instructions given by the S.H.O., he was required to do patrol duty at two points namely Cine lata and at Khareband. He along with Michael Fernandes, a Home Guard went to do night patrol duty. The duty was till 5 a.m. of 17th May, 1994. He has identified the station diary, M.O.3 and entry at serial no. 94 at page 49 regarding his patrol duty. He has also identified M.O.8, the duty register and the entry at page 17.

18. According to P.W.11, Keshav Komarpant, he along with Michael Fernandes, Home Guard, left the Police Station at 11.05 p.m. and went first to Cine

Lata locality and then towards Khareband. They reached the railway gate at about 11.45 p.m. and heard the shouts "Police, Police". He recognised the voice as that of "MRF". He went near the place from where the voice came and he saw "MRF" catching/embracing the deceased Abdul Gaffar Khan. He has stated that the Appellant Sanvlo Naik is called "MRF". He also saw the Appellant Caeiro catching hold of the deceased Abdul Gaffar Khan by his shoulders. Appellant Caeiro told P.W.11, Keshav Komarpant, that the said Abdul Gaffar Khan was required to be taken to the Police Station. According to him, the condition of the said Abdul Gaffar Khan was good. He was wearing a pant and a shirt and appeared to be normal. P.W.11, Keshav Komarpant, states by that, he means he did not have any injuries. P.W.11, Keshav Komarpant, then caught hold of the right hand of Abdul Gaffar Khan and the said Michael Fernandes, Home Guard, caught Abdul Gaffar Khan by the left hand and they started bringing him to the Police Station. Appellant Caeiro and Appellant Sanvlo also came along with them. They had also caught the said Abdul Gaffar Khan. According to P.W.11, Keshav Komarpant, deceased Abdul Gaffar Khan had stated that he should be released and Appellant Caeiro had told him that he would be released after reaching the Police Station. When they reached near the shop of one Govind Poi Raiturcar,

deceased Abdul Gaffar Khan started insisting that he should be allowed to go and he would come walking with us. According to P.W.11, Keshav Komarpant, deceased Abdul Gaffar Khan was a little aggressive and in the said scuffle, the shirt of Abdul Gaffar Khan which was held by Appellant Caeiro was torn. P.W.11, Keshav Komarpant, further states that then he saw slight reddish marks on the back and near the hand of deceased Abdul Gaffar Khan. It was past midnight when Adbul Gaffar Khan was brought to the Police Station.

19. Deceased Abdul Gaffar Khan was taken to the chamber of Appellant, P.I. Caeiro and Appellant, P.I. Caeiro directed P.W.11, Keshav Komarpant and Michael Fernandes, Home Guard to return to their duty point. While returning to their duty point near the shop of Govind Poi Raiturcar, they met one person by name Mohammad and he asked them where Abdul Gaffar Khan was. P.W.11, Keshav Komarpant replied that Abdul Gaffar Khan was in the room of Appellant P.I. Caeiro. It was about 1.15 a.m. when they again reached the railway gate. Near the railway gate, they saw Appellant P.I. Caeiro and Appellant Sanvlo Naik on a scooter and they were going in the direction of Canacona. Appellant Sanvlo Naik, was riding the scooter. They were on their duty point till 5 a.m. and thereafter, returned back. P.W.11, Keshav

Komarpant, has further stated in his examination in chief that when they had brought Abdul Gaffar Khan to the room of Appellant P.I. Caeiro, he had rang the bell and P.W.20, Balkrishna Moge and Accused Yetale had come to the said room. Thereafter, they had left. On request of the learned Public Prosecutor, the prosecution was permitted to cross-examine P.W.11, Keshav Komarpant. In the cross-examination on behalf of the prosecution, he has admitted that he had told the C.B.I. in his statement that Abdul Gaffar Khan had slight reddish marks on the back and on his hand. The said statement was proved by way of an omission. He has admitted not to have stated that he had seen Appellant P.I. Caeiro and Appellant Sanvlo Naik going on scooter as he was not asked by the C.B.I. He was asked to show the entry in the station diary regarding the departure of Appellant P.I. Caeiro. He has denied the suggestion that he was deposing false that Appellant P.I. Caeiro and Appellant Sanvlo Naik had gone on a scooter. He has also denied as false that there were no injuries on the person of Abdul Gaffar Khan. He has admitted not to have stated in his statement that the shirt of Abdul Gaffar Khan was torn. The learned Trial Judge put the following questions to the witness:-

> Q. You have stated in your statement to the C.B.I. that when you saw Abdul

Gaffar Khan at Khareband there was no injury and you all had not beaten him on the road? What have you to say?

A. At that time Abdul Gaffar Khan was wearing the shirt. Confronted with the statement where it is so recorded. I add and say that I had told the C.B.I. that reddish marks could be seen".

20. In the cross-examination on behalf of the Accused, P.W.11, Keshav Komarpant has stated that the size of the cabin of Appellant P.I. Caeiro is about 3 metres x 4-5 metres. The table of Appellant P.I. Caeiro is about 1.4 metres in length and there are about 5 chairs in front of the said table. He has also admitted that there are barracks on the second floor of the building. The Maina-Curtorim has another barrack on the same floor in which about 50 people can sleep. In the further cross-examination on behalf of the Accused, he has admitted that deceased Abdul Gaffar Khan was caught at a distance of about 25 to 30 metres from Tandoor Hotel. The railway gate is at a distance of about 10 metres from the said Tandoor Hotel. Appellant P.I. Caeiro had his residence at Navelim. He had not seen Abdul Gaffar Khan by removing his pant and shirt before he was brought to the Police Station. He was asked the following question in cross-examination:-

Q. If you did not remove his pant and shirt how did you make a statement to the C.B.I. that he had no injury?

A. When his shirt was pulled down I had seen the reddish marks. I had made the statement on the basis of the portions of his body which I could see.

21. In respect of the evidence of P.W.11, Keshav Komarpant, the learned Trial Court in paragraph 24.5 has held that the statement of P.W.11, Keshav Komarpant, that he had seen reddish marks on the back and near the hand of deceased Abdul Gaffar Khan and that he had seen Appellant No.2, Caeiro and Appellant No.5, Sanvlo Naik, going a scooter has necessarily to be rejected as they were omissions from the statement made before the C.B.I. It is extremely hazardous to reject the testimony of any witness merely on the basis of any omissions or contradictions appearing in the evidence. The Court while appreciating the evidence of the witness has to assess whether the omissions or contradictions are on material aspects of the prosecution case and whether, therefore, they had been introduced deliberately by the witnesses in their evidence to fortify or buttress the prosecution case or fill up a lacuna in the prosecution case. In respect of these omissions, P.W.11, Keshav Komarpant, had stated that he had seen some pre-arrest injuries

on the person of deceased Abdul Gaffar Khan and had accordingly stated so before P.W.25, James Kurien, Dy.S.P., when his statement was recorded. In respect of his statement of having seen Appellant Caeiro and Appellant Sanvlo Naik going on his scooter, he has stated that since he was not asked by the C.B.I. regarding that, he had not stated the fact to the C.B.I.. If a particular statement of a witness is required to be discredited or disbelieved, an opportunity is given to the prosecution to cross-examine the witness. The said statement cannot be discarded on the basis that it is an omission in the statement, unless the statement is so inherently improbable or that it is totally falsified by the other cogent substantial evidence on record. In the present case, I find that there is evidence of other witnesses that Appellant Caeiro and Appellant Sanvlo Naik had left the Police Station on his scooter. Therefore, according to me, the learned Trial Court was in error in completely discarding the two statements of P.W.11, Keshav Komarpant, on the ground that the statements were by way of omissions. This assumes importance in view of the findings recorded by the learned Trial Court in paragraph 14.2 of the Judgment in recording the statements by P.W.25, James Kurien, Dy.S.P. This is what the learned Trial Court observed in respect of P.W.25, James Kurien, Dy.S.P.

"Admittedly, the statements produced are typewritten and Shri Kurien has admitted that he had recorded the said statements in his own handwriting and that he had read over and explained the said statements to the witnesses. He further stated that later on the statements were typed out but he did not remember where and when they were typed out. He further admitted, (page 13, line 9) that the original statements written in hand were subsequently destroyed after they were typed. One, therefore, would be at pains to understand whether the said statements which were handwritten by Shri Kurien were correctly typed or not".

22. P.W.16, Constable Ulhas Saluke, states that in May, 1994, he was attached to the Margao Town Police Station. On 16th/17th May, 1994, his duty was at the lock-up of the Police Station. His duty was that of a sentry. On 16th May, 1994, he did duties for two hours between 5 p.m. to 7 p.m. and from 1 a.m. of 17th May, 1994 to 3 a.m. of 17th May, 1994. He further states that the lock-up at the Police Station has two cells, one meant for males and the other for females. At 1 a.m. on 17th May, 1994, in the male lock-up, there were 4 Accused while there were no female persons in the female lock-up. He further states that at about 1.30 a.m., one Accused

was brought, whose name he learnt subsequently as Abdul Gaffar, by Appellants Caeiro and Sanvlo Naik. Abdul Gaffar Khan was put in the female lock-up. The said Abdul Gaffar Khan came walking. He was wearing a red colour pant and was not wearing any clothes on the upper portion of his body. He further states that he had seen the said Abdul Gaffar Khan as he was brought. He had slight injuries on the hands near the right shoulder and also on the back. After about 2 minutes, Abdul Gaffar Khan started making noise stating that he should be removed from the lock-up. He stated that otherwise he would die there. Accordingly, P.W.16, Ulhas Saluke, reported the matter to Accused No.4, Narayan Yetale. Thereafter, the said Accused No.4, Narayan Yetale, Havaldar Kalangutkar, P.C. Kerkar removed the said Abdul Gaffar Khan and took him out saying that he is being taken to the hospital. The said Abdul Gaffar Khan walked along with them with the support of Kerkar and Kalangutkar. In the cross-examination, P.W.16, Ulhas Saluke, has admitted that near the P.S.I's room there were about 21 or 25 persons to be arrested. The said persons were present there till he was on duty till about 3 p.m.

23. The learned Trial Court in paragraph 24.8 of its Judgment has held that "I find difficult to believe that the deceased, with injuries as seen in

photographs Exh.54, could ever be in a position to be taken walking even with support. It is rather strange that P.W.16, Ulhas Saluke, who claims to be on duty and that too on sentry duty in the lock-up does not know how the deceased came to be assaulted with fatal injuries, as seen on the said photographs, Exh.54 and as described by Dr. Sapeco in Exh.67". The learned Trial Court, therefore, has held that the evidence of P.W.16, Ulhas Saluke, does not inspire confidence and otherwise is of no assistance in the case of Appellant Caeiro and Appellant Sanvlo Naik.

24. P.W.17, Abdul Khan, states that in May, 1994, he was posted in Margao Town Police Station. On the night of 16th May, 1994, his duty was of reserve Constable from 8 p.m. to 8 a.m. of next day. He further states that between 12 and 12.30 a.m. Abdul Gaffar Khan was brought to the Police Station by Appellant Caeiro, Constable Sanvlo Naik, Constable Komarpant and Home Guard Michael Fernandes. He had seen them while they brought the said Abdul Gaffar Khan who was brought walking. Abdul Gaffar Khan was wearing a red colour long pant and his condition was "usual" and he came walking. First he was taken to the cabin of Appellant Caeiro. Appellant Caeiro sat at his place and Home Guard Michael Fernandes stood along with Abdul Gaffar Khan. Appellant Sanvlo Naik

and P.W.11, Keshav Komarpant, were at the door of the cabin. He heard the Appellant Caeiro questioning Abdul Gaffar Khan only. Thereafter, Havaldar Balkrishna Moge told him that he had received a phone message from the hospital and he should go there. Accordingly, Havaldar Balkrishna Moge gave him written Memo. He took the Memo and went to the Hospicio Hospital and handed over the said Memo to Dr. Dalvi. After some time, Dr. Dalvi gave him the certificate and he returned to the Police Station and handed over the said certificate to Havaldar Balkrishna Moge. Thereafter, on instructions of Original Accused No.4, Narayan Yetale, he stood guard of 21 Accused from the Military who were in the Officer's room.

25. In the cross-examination, he has stated that he was standing in the duty master's room when deceased Abdul Gaffar Khan was brought to the Police Station. He states he did not enter the cabin of Appellant Caeiro but was standing outside. According to him, on the other side of the passaqe and on the left as one enters the Police Station is the Officer's room where 21 Accused were kept. The lock-up is at the end of the passage. The male lock-up is to the right of the passage and the female lock-up is to the left of the passage. When he returned to the Police Station from the Hospital, it was 1 p.m. In the

further cross-examination, he has admitted that deceased Abdul Gaffar Khan was not assaulted when he was present there. In the cross-examination on behalf of Original Accused No.4, Narayan Yetale, he has stated that the said 21 Accused from the Military were present in the Police Station before he went to the hospital. The said 21 Accused were brought to the Police Station around 10 or 11 p.m.

26. In respect of this witness, in para 25.1, the learned Trial Court has held that the evidence of P.W.17, Abdul Khan, is of little assistance to the prosecution and of no assistance to the Accused. The learned Trial Court has relied on the admission of P.W.17, Abdul Khan, that when deceased Abdul Gaffar Khan had been brought to the Police Station there was nothing in the hands of the Appellants. Thus, according to the learned Trial Court, the defence of the Accused that they were attacked by deceased Abdul Gaffar Khan with a "gupti" was falsified.

27. P.W.18, Police Constable Anil Kerkar, states that in May, 1994, he was attached to the Margao Town Police Station. He was on reserve duty from 8 p.m. till 8 a.m. of next morning. According to him, at about 10.15 p.m. some Accused from Military were brought. He was told to look after the said 21

Accused by Original Accused Narayan Yetale. They were kept in the P.S.I's room. He remained inside the room with the door closed. He states that there was another Constable with him but he does not remember his name. At about 1.30 or 2.00 a.m., Original Accused Narayan Yetale called him out. Original Accused Narayan Yetale had instructed him to take one Accused from the lock-up to the hospital. He along with Havaldar Kalangutkar and Accused Narayan Yetale took deceased Abdul Gaffar Khan from the female lock-up to the hospital in a jeep. He has further stated that when he had seen deceased Abdul Gaffar Khan in the lock-up, he did not notice any marks on his body. The prosecution was permitted to cross-examine P.W.18, Police Constable Anil Kerkar. He has denied that his statement was recorded by Dy.S.P. James Kurien of C.B.I. He has admitted as correct that at 2 a.m. Accused Narayan Yetale had directed him to go to the female lock-up. He denied to have stated in his statement that A.S.I. Narayan Yetale had told him that one Abdul Gaffar Khan is serious and that he has to be taken to the hospital. He denied to have stated in his statement that he had gone to the female lock-up along with Accused Narayan Yetale and Appellant Sanvlo Naik, Head Constable Kalangutkar, P.C. Shiva Kale and P.C. Jerry Gomes. He has denied to have stated that Accused Narayan

Yetale had seen the pulse of the deceased Abdul Gaffar Khan. He has denied to have stated in his statement that he had seen lot of injury marks on the body of Abdul Gaffar Khan. He has denied to have stated that he had seen Appellant Caeiro and Original Accused No.1, Joe D'Souza going to the hospital. He has admitted that after reaching the hospital after about 10 minutes, Appellant Caeiro and Original Accused No.1, Joe D'Souza, had come there. In the cross-examination on behalf of the Accused, he has admitted that it was Accused Narayan Yetale who had directed him to keep a guard on the 21 Accused Military. The learned Trial Court in paragraph 26.1 has held that the evidence of P.W.18, Anil Kerkar, "has got to be discarded lock, stock and barrel".

28. P.W.19, Nynashwar Kalangutkar, states that in May, 1994, he was attached to the Margao Town Police Station as Constable. He was on reserve duty from 8 p.m. of 16th May, 1994 till 8 p.m. of 17th May, 1994. On that night, at about 12.15, Abdul Gaffar Khan was brought to the Police Station by Appellant Caeiro, Appellant Sanvlo Naik, P.W.11, Keshav Komarpant and a Home Guard. All of them had come walking. Appellant Caeiro then took Abdul Gaffar Khan to his Office and was interrogating him. Appellant Caeiro then arrested him and put him in the

lock-up at 1.30 a.m. Appellant Caeiro and Appellant Sanvlo Naik then went away. According to him, at about 1.30 a.m. Accused A.S.I., Yetale had told him that Abdul Gaffar Khan "was not alright" and, therefore, he was to be taken to the hospital. He, Accused Yetale and P.W.18, Anil Kerkar, went to the lock-up and removed Abdul Gaffar Khan from the lock-up. According to him, Abdul Gaffar Khan was kept in the female lock-up as there were four other Accused in the male lock-up. According to him, when he went to the lock-up, he saw Abdul Gaffar Khan holding the bars of the door of the lock-up and he was in a standing position. The upper portion of the body of Abdul Gaffar Khan was exposed and he had seen marks of injuries on his back. They reached the hospital within five minutes and he had carried a Memo addressed to the Medical Officer. He has identified the Memo at Exh.68. According to him, the said Memo is signed by Appellant Caeiro and the said Memo was given to him by Accused Narayan Yetale. While the doctors were examining him, Appellant Caeiro and Original Accused No.1, Joe D'Souza arrived at the hospital at about 2.30 a.m. In respect of this witness also the prosecution sought permission to cross-examine the witness. In the cross-examination on behalf of the prosecution, P.W.19, Nynashwar Kalangutkar, denied to have stated that he saw Abdul

Gaffar Khan sitting seeking support of the door of the lock-up. He has denied to have stated that Abdul Gaffar Khan was unconscious but because he was moaning he thought he was alive. He has denied to have stated that Abdul Gaffar Khan was wearing only a reddish colour pant. He has denied the presence of Appellant Sanvlo Naik when they had gone to the lock-up for removing Abdul Gaffar Khan. In the cross-examination on behalf of the Accused, he has admitted that it was the nurse who took the Memo from him and the nurse wrote something in the register after looking at the Memo. The doctor came within 10 to 15 minutes and after the arrival of the doctor, the Police were asked to wait outside. In the cross-examination on behalf of the Original Accused Nos.2 and 5, he has admitted that when they had taken Abdul Gaffar Khan to the hospital neither Appellant Caeiro nor Appellant Sanvlo Naik were present in the Police Station. The jeep in which Abdul Gaffar Khan was taken to the hospital was driven by a driver named Vito. Abdul Gaffar Khan could not be taken to the hospital for 5 to 10 minutes as the punctured tyre of the jeep was being replaced. He was shown the station diary and he has stated that the station diary was closed and opened by A.S.I. Narayan Yetale. He has admitted that at 0.20 hours an offence is registered vide Crime No.151 under Sections 224, 353 against deceased Abdul Gaffar Khan and the

said entry is made by Appellant Caeiro. In response to the Court question he has admitted that the injuries as seen in the photograph Exh.53 were present on Abdul Gaffar Khan. He was asked the following question by the Court:-

> Q. You have stated that P.I. Caeiro was not at the Police Station. Can you say where P.I. Caeiro signed the Memo Exh.68?
>
> A. P. I. Caeiro had kept the said Memo ready at the Police Station in the station diary and had gone away.

29. The learned Trial Court in paragraph 27.2 of its Judgment has held "P.W.19, Kalangutkar stands contradicted with too many of his earlier statements made to the C.B.I. and as such, his evidence has got to be rejected as untrustworthy. In the same paragraph, the learned Trial Court has further observed "the statement of P.W.19, that he had taken the request letter - Exh.68 for examination has got to be considered as a lie, because both the doctors, namely P.W.5, Dr. Sawant and P.W.13, Dr. Dessai have stated that the said request letter was brought subsequently".

30. P.W.20, H.C.Balkrishna Moge, states that in 1994, he was attached to Margao Town Police Station as

Head Constable. He was on SHO duty from 8 p.m. of 16th May, 1994 to 8 a.m. of 17th May, 1994. The lock-up register and the Arrest register remains in his custody as a SHO. The duty chart/book is maintained by him. He has identified M.O.2 as the duty chart/book. The duty Officer on that night was Accused Yetale. According to him, at about 11 p.m., the Officers were called and instructions were given by Appellant P.I. Caeiro to them in respect of their duties. At about 11 or 11.30 p.m., a phone message was received. The caller, however, did not disclose his identity. The caller had informed that there was a fight going on at Khareband and P.W.20, Balkrishna Moge, should send some Policemen. P.W.20, Moge informed the caller that a Police party was already at Khareband and they must have reached there. P.W.20, Moge, did not send anyone as P.W.11, Keshav Komarpant and Home Guard Michael Fernandes were deputed for duty at Khareband. According to him, Appellant Caeiro had already left the Police Station before he received the phone message. He has admitted that Appellant Caeiro had made an entry in the station diary M.O.3. Appellant Caeiro returned again at 12.15 or 12.30 and he told P.W.20, Moge, to send the station diary and went to his cabin. Accused Yetale then took the station diary and went to the cabin of Appellant Caeiro. Appellant Caeiro then summoned P.W.20, Moge,

by ringing a bell. P.W.20, Moge, went to the cabin of Appellant Caeiro and saw deceased Abdul Gaffar Khan, Michael Fernandes(Home Guard) and Appellant Sanvlo Naik in the cabin of Appellant Caeiro. P.W.20, Moge, states that Abdul Gaffar Khan was standing and his condition was good. There were some reddish marks on the back of his body. Appellant Caeiro then told P.W.20, Moge, that their scooter was near Khareband near Tandoor Hotel and P.W.20, Moge, should make arrangements for bringing it. The key of the scooter was handed over to P.W.20, Moge, by Appellant Sanvlo Naik. P.W.20, Moge, in turn handed over the key of the scooter to a driver named Vito and instructed him to bring the scooter and to return the key to Appellant Sanvlo Naik. After some time, one Sadanand Naik came with some other person who told P.W.20, Moge, that they were called by Appellant Caeiro to be panch witnesses and he sent them to meet Appellant Caeiro. He has stated that he has not made any entry in the lock-up register on that night. He had given the key of the lock-up to Appellant Sanvlo Naik. Appellant Sanvlo Naik, had informed him on his questioning that P.I. Caeiro had arrested Abdul Gaffar Khan and, therefore, wanted the key. He states that he saw Appellant Sanvlo Naik and Appellant Caeiro taking Abdul Gaffar Khan to the lock-up. After Abdul Gaffar Khan was put in the lock-up, Appellant Sanvlo

Naik, handed the key to P.W.20, Moge. According to him, the Military Officers were having a talk with Accused Yetale in connection with their case and while he was sitting there he did not hear any other noise. The door of the SHO room remains open.

31. In the further examination-in-chief, he has stated that there were two lock-ups, one meant for males and the other for females. Abdul Gaffar Khan was put in the female lock-up. In M.O.4, he was shown an entry at serial no.29 but he has stated that it was not in his handwriting. He also states that he had asked Appellant Sanvlo Naik as to why deceased Abdul Gaffar Khan was being put in the female lock-up and Appellant Sanvlo Naik had told him that Abdul Gaffar Khan was a goonda person and had taken drinks. He was asked the following question in examination-in-chief:-

> Q. Did you check whether the said Abdul was arrested before he was put in the lock-up?
>
> A. He was arrested by the incharge of the Police Station. The arrest register remains in the custody of the SHO. Whoever arrests a person takes it and makes an entry of arrest.

32. He was shown the Arrest register, M.O.5 and

has identified the entry at serial no.402 showing the arrest of Abdul Gaffar Khan in Crime No.151/94. He has identified the signature of Appellant Caeiro. After handing over the key of the lock-up, Appellant Caeiro and Appellant Sanvlo Naik, went to the cabin of the P.I.. Mohammad then went with Appellant Caeiro to his cabin. He further states that at 1.30 or 1.45 a.m. Accused Yetale, the night duty officer had asked him for the key of the lock-up and thereafter had seen the Police Officer taking Abdul Gaffar Khan for medical examination. At about 3.30, he saw Accused No.1, Joe D'Souza, Appellant Caeiro, Havaldar Kalangutkar, Accused Yetale and Constable Kerkar returning from the hospital. Accused No.1, Joe D'Souza, had told P.W.20, Moge, to keep the books as the Collector would come and attach them.

33. In the cross-examination on behalf of the Accused, he has admitted that six persons were on duty at the Police Station on that night including the sentry. There were about 26 Accused in the Police Station on that night. The Military personnel who had come to give complaint were at the Police Station till 1.15 or 1.20 a.m. He was shown the entry in the station diary M.O.3. Entry No.89 is made at 22.30 hours by Appellant Caeiro. On 16th May, 1994, the said entry shows that Appellant Caeiro returned from

Crime Conference and Investigation in Crime No.145/94 and then proceeded on one day Casual Leave on 17th May, 1994. According to him, the Appellant Caeiro had left the Police Station after making the said entry at 22.30 hours before he returned with Abdul Gaffar Khan. According to P.W.20, Moge, the arrest of Abdul Gaffar Khan is shown in the station diary at serial no.3 at 0.20 hours on 17th May, 1994. Entry No.6 at 1.25 hours shows the departure of P.I. Caeiro to residence for rest. The said entry is written and signed by Appellant Caeiro. He further states that Appellant Caeiro after his departure at 1.25 a.m. returned back to the Police Station at about 3.30 a.m. along with the other staff who had taken Abdul Gaffar Khan to the hospital. According to him, when Abdul Gaffar Khan was being taken to the lock-up, Appellant Sanvlo Naik and Appellant Caeiro were with him and neither of them had held Abdul Gaffar Khan at that time. According to him, the station diary along with the Memo of the Medical Officer at Exh.68 was given to him by Appellant Caeiro after Abdul Gaffar Khan was put in the lock-up and Appellant Caeiro had told him to tell the duty Officer to send Abdul Gaffar Khan for medical examination. Since the jeep was not available as it had a punctured tyre, the station diary was given to P.W.20, Moge, with instructions to give it to the duty Officer. He has further stated that after about 1.20

a.m., Appellant Sanvlo Naik and Appellant Caeiro went by scooter. The said scooter belonged to Appellant Sanvlo Naik and was driven by him while Appellant Caeiro sat on the pillion. He further states that when he went to bring the station diary, Appellant Sanvlo Naik, two panchas, Mohammad and Appellant Caeiro were in the cabin.

34. The learned Trial Court in paragraph 28.3 of its Judgment has held "P.W.20, Moge, though being an Officer on SHO duty, has again feigned ignorance as to how the fatal injuries were caused to the deceased". The learned Trial Court has rejected the statement of P.W.20, Moge, that he had received a telephone call at 11 or 11.30 p.m. That a fight was going on at Khareband on the ground that no station diary entry had been made. The learned Trial Court, therefore, rejected the evidence of P.W.20, Moge.

35. The learned Trial Court in paragraph 29 of its Judgment has held that the records of the Police Station as well as the evidence of the Police Officers examined by the prosecution shows that a concerted attempt had been framed to suppress the actual time of arrest of the deceased as well as the time when he was taken to the hospital. The learned Trial Court

rejected the statements of the witnesses that Appellant Caeiro and Appellant Sanvlo Naik had left the Police Station on scooter on the sole ground that "it is not as per the station diary which is compulsorily required to be maintained at the Police Station". The learned Trial Court in paragraph 30 of its Judgment has observed "there is also evidence on record to show that the deceased was brought walking all the way from near about Tandoor Hotel to the Police Station and was also taken walking when he was put in the female lock-up". The learned Trial Judge has further observed "assuming that P.W.11, Komarpant did see reddish marks on the deceased or for that matter, P.W.16, saw slight injuries like P.W.19, Kalangutkar, who saw injuries on his back, or for that matter D.W.2, Sadanand saw injuries on his shoulders, hands, legs etc. as mentioned in panchanama Exh.131" ..... . "It is not the case of any of the Accused that Abdul Gaffar Khan died on account of the aforesaid pre-arrest injuries". The learned Trial Judge then went on to observe that the claim of the Appellants that they had gone home was not correct as there was evidence on record which clearly showed that they were present in the Police Station. According to me, this observation of the learned Trial Court is not supported by the evidence on record. The evidence of the witnesses examined by the prosecution clearly

suggested that the Appellants Caeiro and Sanvlo had gone home after placing the deceased Abdul Gaffar Khan in the lock-up. The evidence of these witnesses and particularly the evidence of P.W.20, Moge, who has not been declared hostile by the prosecution, cannot be disbelieved merely because of some infirmities in the entries in the station diary. Nothing prevented the prosecution from declaring P.W.20, Moge, hostile and cross-examining him. P.W.20, Moge and other witnesses have stated in clearest possible terms that both the Appellants had gone home on the scooter driven by Appellant Sanvlo Naik. Therefore, according to me, the evidence on record clearly suggested that the Appellants had gone home. This plea of "alibi" has certainly been proved by the Appellants. The evidence of these witnesses cannot be brushed aside on the ground that only Appellant Caeiro had made an entry in this regard in the station diary but there was no entry made by Appellant Sanvlo. Nor can the evidence of these witnesses be brushed aside on the ground that the entry regarding their departure has been squeezed inbetween small space available above entry at serial no.7 or that it had been hurriedly written or that there were some overwritings or erasures. The evidence in respect of the alibi does not rest on the mere existence of the entry of departure in the station diary but the entry in the departure of the

station diary are additional props or corroborative to the substantive evidence of the Police Officers including P.W.20, Moge, that the Appellants had gone home. The prosecution had cross-examined these Police Officers except P.W.20, Moge, in respect of the departure of the Appellants but despite of the cross-examination by the prosecution the witnesses have emerged unscathed and, therefore, the learned Trial Judge was not correct in my opinion in brushing aside the substantive evidence on the basis of infirmities in respect of the entries in the station diary.

36. There is absolutely no evidence on behalf of the prosecution that the deceased Abdul Gaffar Khan was assaulted in the Police Station at all. There is no evidence that the Appellants had assaulted the deceased Abdul Gaffar Khan. Likewise, there is no evidence that the deceased Abdul Gaffar Khan was assaulted by other Police Officers excluding the Appellants. In fact, there is no evidence at all that the deceased was assaulted in the Police Station. As to who assaulted the deceased in the Police Station, assuming that he was so assaulted in the Police Station is a mystery that the prosecution has not cleared. In fact, strangely the learned Trial Judge has recorded a finding in paragraph 32 of the Judgment

and the finding is "since Abdul Gaffar died in the female lock-up soon after he was put there in good condition by both A-2 Caeiro and A-5 Sanvlo, but due to fatal injuries inflicted on him whilst he was in custody, it is reasonable to infer or presume that both the said Accused were also the authors of the fatal injuries, which were inflicted on the deceased.....". Thus, according to the learned Trial Court, the deceased Abdul Gaffar Khan was put in the female lock-up in a good condition by the Appellants. It is wholly impermissible in law to draw an inference that the Appellants must have caused the fatal injuries whilst the deceased Abdul Gaffar Khan was in custody due to which he died. The prosecution has got to prove the offence beyond reasonable doubt and the conviction could never be based on inferences or presumptions however reasonable they may appear to be. Curiously, the learned Trial Judge in paragraph 33 while acquitting Original Accused No.3, Gundu Naik and Original Accused No.4, Narayan Yetale, has held that there was no direct or circumstantial evidence on record to justify their involvement in the assault though they were said to be present in the Police Station.

37. The learned Trial Court considered the case of the Appellants, as per paragraph 34 of the Judgment

differently by adopting "a realistic approach". Reliance was placed by the learned Trial Court on the Judgment of the Supreme Court in **State of M.P. v. Shyamsunder Trivedi and others** (1995) 4 SCC 262. The other Accused in this case have been acquitted and the evidence as against the present Appellants is no different as the evidence from the other Accused except these Appellants along with the other two witnesses who had arrested the deceased Abdul Gaffar Khan. There is no record to suggest that the deceased Abdul Gaffar Khan while he was in the cabin of Appellant Caeiro was assaulted. In fact, there is no evidence at all that he was assaulted.

38. In the aforesaid Judgment, on a reliance which is placed by Mr. S. N. Sardessai, learned Public Prosecutor appearing on behalf of the State, at paragraph 16, the Supreme Court has spelt out the circumstantial evidence against the Accused therein. The circumstances were:-

i. That the deceased had been brought alive to the police station and was last seen alive there on 13-10-1981.

ii. That the dead body of the deceased was taken out of the police station on 14-10-1981 at about 2 p.m. for being removed to the hospital.

iii. That the deceased had died as a result of the receipt

of extensive injuries while he was at the police station.

iv. That S.I. Trivedi, Respondent 1, Ram Naresh Shukla, Respondent 3, Rajaram, Respondent 4 and Gannuiddin, Respondent 5 were present at the police station and had all joined hands to dispose of the dead body of Nathu Banjara.

v. That S.I. Trivedi, Respondent 1 created false evidence and fabricated false clues in the shape of documentary evidence with a view to screen the offence and for that matter, the offender.

vi. S I Trivedi – respondent in connivance with some of his subordinates, respondents herein had taken steps to cremate the dead body in hot haste describing the deceased as a "lavaris".

vii. Rajaram and Gannuiddin – respondents, had brought the deceased to the police station from his village, and

viii. That the police record did not show that either Rajaram or Gannuiddin had left the police station, till the dead body was removed to the hospital in the jeep, unerringly point towards the guilt of the accused and the established circumstances coupled with the direct evidence of PWs 1, 3, 4, 8 and 18 are inconsistent only with the hypothesis of the guilt of the respondents and are inconsistent with their innocence. So far as Respondent 2, Ram Partap Mishra is concerned,

> however, no clinching or satisfactory evidence is available on the record to establish his presence at the police station when Nathu deceased was being subjected to extensive beating or of his participation in the commission of the crime. The High Court erroneously overlooked the ground reality that rarely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel would be available, when it observed that 'direct' evidence about the complicity of these respondents was not available. Generally speaking, it would be police officials alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues, and the present case is an apt illustration, as to how one after the other police witnesses feigned ignorance about the whole matter.

39. The facts of the aforesaid Judgment, therefore, according to me, can be distinguished. The facts in the present case are not similar at all.

40. The defence of Appellant Sanvlo Naik, is that at about midnight, he and Appellant Caeiro, P.I.

were going on scooter towards Tandoor Hotel and at that time they saw Abdul and some more persons. He went to Abdul and told him that Saib "Appellant Caeiro" wanted him. He embraced him and caught him. Immediately two Constables who were on night duty, came there. They caught Abdul Gaffar Khan and brought him to the Police Station. A panch was brought at the Police Station. P.I. Shri Caeiro prepared a panchanama and at about 1.30 a.m. the said Abdul Gaffar Khan was taken walking from the S.H.O room to the lock-up. He was put in the female lock-up. His condition was good at that time. Thereafter, he went on scooter to reach Appellant Caeiro at his residence at Navelim. Thereafter, he proceeded to his residence. On the next day, he learnt from Havaldar Saluke that Yetale and Kalangutkar had taken him to the hospital.

41. Appellant Caeiro in his statement under Section 313 has stated that when he had put Abdul Gaffar Khan in the lock-up, his condition was good. Abdul Gaffar Khan had walked upto the lock-up. He did not put him in the male lock-up because there were four male prisoners there and also because Abdul Gaffar Khan was a dangerous criminal and he may harass the said prisoners. He was put in the female lock-up where there were no other prisoners. At about 1.25

a.m., he went to his residence at Navelim and was reached by Appellant Sanvlo Naik. At about 2.45 a.m., he received a phone call from the Constable on duty from the hospital and was told that Abdul Gaffar Khan was brought in the hospital in a serious condition. He informed Dy.S.P. Joe D'Souza and both of them went to the hospital. From the hospital, after being informed that Abdul Gaffar Khan was dead, he returned to the Police Station. According to him, he had prepared the Arrest Panchanama and had noted whatever simple injuries were seen by him. He had prepared a letter to the Medical Officer in order to send Abdul Gaffar Khan for medical examination. The jeep of the Police Station had a punctured tyre and the same was being replaced and, therefore, Abdul Gaffar Khan was put in the lock-up. He had instructed S.H.O., P.W.20, Moge and the night Officer, Original Accused No.4, Yetale, to take Abdul Gaffar Khan to the hospital as soon as the jeep was repaired. He put the Memo in the station diary and handed over the station diary to P.W.20, Moge. He has stated that he has not assaulted Abdul Gaffar Khan nor did he allow anybody to assault him while he was in his custody. The defence of both the Appellants, according to me, is clearly borne out by the substantive evidence of the prosecution witnesses themselves.

42. Deceased Abdul Gaffar Khan was arrested vide Arrest Panchanama at Exh.31 and D.W.2, Sadanand is the panch witness. In the station diary(M.O.3) at entry no.5 is an entry recorded at 0.20 hours by Appellant Caeiro regarding the arrest of deceased Abdul Gaffar Khan and the obstruction caused by the deceased and giving tooth bite by the deceased to Appellant Sanvlo Naik. The deceased thus came to be arrested under Sections 224, 353, 332 of the Indian Penal Code in Crime No. 151/94. The Arrest Panchanama at Exh.151 also records certain injuries on the person of the deceased. The "gupti" is shown to have been seized. The panchanama concluded at 01.20 hours. The evidence of the prosecution witnesses is to the effect that the Memo for examination of the deceased was kept ready in the station diary by the Appellant Caeiro and Appellant Caeiro had instructed P.W.20, Moge, to take the deceased to the hospital but because of non availability of the jeep, the deceased could not be taken to the hospital. Merely because the Memo for examination of the deceased was received late by the doctor that would not indicate that it was fabricated subsequently. There is a station diary entry regarding the departure of Appellant Caeiro from the Police Station. The said station diary entry is no.6. This station diary coupled with the substantive evidence of the witnesses and the Hurt Certificate of

Appellant Sanvlo Naik, corroborates the defence of the Appellant. However, it is true that Appellant Sanvlo Naik, was examined subsequent to the deceased being declared dead. However, in my opinion, that would not fiddle down the fact that Appellant Sanvlo Naik, had injuries. It is also true that the doctor has deposed that Appellant Sanvlo Naik did not have tooth bite injuries. However, in the cross-examination, he has admitted the possibility of an injury being a tooth bite injury.

43. According to the learned Trial Court at paragraph 18.1 "I am inclined to believe, though there is no direct evidence on record, that the deceased Abdul Gaffar Khan was put in the female lock-up not because there was no place in the male lock-up, as told to P.W.23, Shri G. C. Rane by Dy.S.P. Shri Paes, or not because Abdul Gaffar Khan being a dangerous criminal, may not harass the other four Accused in the male lock-up, as contended by Appellant No.2, Caeiro, but only because that was the only place where the deceased could be freely assaulted "black and blue", for his past sins of omissions and commissions without the gaze or glare of anyone else except the Police Officials .....".

44. Thus, according to the learned Trial Court,

the assault, if any, of beating the deceased Abdul Gaffar Khan "black and blue" had taken place in the female lock-up. As per the evidence on record, Appellant Caeiro and Appellant Sanvlo Naik had already left the Police Station after placing the deceased in the female lock-up. There is absolutely no evidence on record that the deceased Abdul Gaffar Khan was assaulted in the female lock-up by anyone. If the assault, is in the female lock-up, the guilty persons are obviously Police Officers other than the Appellants.

45. A false defence or an attempt to create false defence can at the best be used as either an additional link or a missing link in the chain of the circumstantial evidence already established. But a false defence or an attempt to create false defence by themselves cannot be used for convicting an Accused in the absence of any other evidence pointing unerringly to the guilt of the Accused. The prosecution must stand or fail on the basis of the evidence that it leads in support of the charge. Falsity of the defence by itself cannot be used as a foundation for resting a conviction.

46. The learned Trial Court in paragraph 31 had held that mere presence in the Police Station was not

enough for conviction. This was in respect of Original Accused No.3, Gundu Naik. Strangely, the learned Trial Court observed in paragraph 31 of its Judgment that Appellant Caeiro was incharge of the Police Station and he cannot simply get away from the situation by stating that after putting the deceased Abdul Gaffar Khan in the lock-up, he went away and did not know how the fatal injuries were caused to the deceased Abdul Gaffar Khan. The learned Trial Court further observed that if he accepts such a simple explanation then it will be very easy for the Police Officers to finish anybody in their custody and the law will then become ineffective. According to the learned Trial Court, deceased Abdul Gaffar Khan was put in the lock-up by the Appellants and he was in a good condition. Curiously none of the witnesses speak about the deceased Abdul Gaffar Khan having received the injuries which are described in the post mortem report before he was put in the lock-up. The evidence on record clearly indicates that the Appellants thereafter went home. In such circumstances, therefore, it was for the prosecution to have led evidence as how and at whose hands the deceased Abdul Gaffar Khan had received injuries. If the claim of the Appellants, that they had gone home, is accepted and according to me, it should be in view of the positive evidence in that respect, the Appellants

cannot be called upon to explain as to how the deceased Abdul Gaffar Khan received the injuries. Suspicion, however, strong cannot be used as a substitute for proof and in cases resting on circumstantial evidence the prosecution has to prove each and every circumstance and the circumstances so proved should exclude every hypothesis of guilt and should unerringly point to the guilt of the Accused. A conviction can never be based on mere surmises and assumptions. The connecting link between the crime and the Accused should be clearly established and in the absence of that howsoever, heinous a crime may be, the Accused can never be convicted unless their guilt is established beyond reasonable doubt. It is unfortunate that the deceased Abdul Gaffar Khan died in the Police Station but unless and until there is evidence which crosses the yawning gap between may be true and must be true, the Accused cannot be convicted.

47. After giving my anxious consideration to the evidence on record, I am of the opinion that the prosecution has failed to prove the offence against the Accused beyond reasonable doubt and the Accused are, therefore, to be acquitted.

48. Accordingly, Criminal Appeal Nos.3 and 4 of

2002 are allowed. The conviction and sentence passed against the Appellants is hereby quashed and set aside and the Appellants are acquitted of the aforesaid charges which they have been convicted. Their Bail Bonds are cancelled. Fine, if paid, be refunded to the Appellants.

P. V. HARDAS, J.

RD.